IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1859

SALVATORE LARCA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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SALVATORE LARCA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Salvatore Larca prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit affirming his criminal conviction.

Opinion Below

The Court of Appeals for the Second Circuit affirmed the judgment of conviction herein without opinion. A transcript of the of the oral proceedings before the Court may be found in Appendix A hereto, *infra* pp. 1a-3a.

Jurisdiction

The order of the Court of Appeals affirming petitioner's conviction was filed on April 4, 1977. Thereafter petitioner timely filed a petition for rehearing and

suggestion for rehearing *en banc*. This petition was denied on May 27, 1977.* The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional and Statutory Provisions Involved

1. The Sixth Amendment to the Constitution of the United States.

2. Rule 803(6) of the Federal Rules of Evidence.

The provisions are set forth in Appendix C to this petition.

Questions Presented

Was The Petitioner's Rights To Have Compulsory Process And To Confront The Witnesses Against Him Violated By The Trial Court's Exclusion Of Hospital Records Which Demonstrated That The Prosecution's Key Witness Gave Perjured Testimony As To Material Facts.

Statement of the Case

A. The Charges

On December 21, 1976 the petitioner and two others were convicted after a jury trial of conspiring to import, distribute and possess with intent to distribute narcotics in violation of sections 812, 841(a)(1), 841(b)(1)(A), 846, and 952 of Title 21 U.S.C. The petitioner was also charged with the substantive offense of possession with intent to distribute narcotics in violation of 21 U.S.C. sections 812, 841(a)(1), and 841(b)(1)(A).

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* Annexed hereto as Appendix B is the Order of the Court of Appeals denying petitioner's petition for rehearing and suggestion for rehearing *en banc*.

The petitioner was sentenced to serve concurrent terms of 15 years on each count and given three years Special Parole.

B. Summary of the Prosecution's Case

On August 17, 1976, Gene Travers was arrested by the United States Customs Service at Honolulu, Hawaii, when he tried to smuggle approximately seven pounds of heroin into the United States. Through Travers' cooperation, agents of the Drug Enforcement Administration apprehended Joseph Boriello, the central operative in the conspiracy alleged herein and the linch-pin of the prosecution's case against the petitioner.

Relying primarily on the testimony of Boriello, the following story emerged:

In April 1976, Boriello, a thrice convicted felon and narcotics addict, using a forged passport, traveled to Bangkok, Thailand. In Bangkok, Boriello met a part-time law student and bell-hop named Lee Chai who, according to Boriello, supplied him with a quantity of heroin.* The contraband was smuggled into the United States strapped to Boriello's waist the first week of May, 1976.

Soon after his return to New York, Boriello met with his half brother, Ralph Battista, and the petitioner. Boriello maintained that during the course of this meet-

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* As is here indicated, the touchstone of Boriello's narrative was his April trip to Bangkok. It was conceded that the defendant Larca had nothing to do with this trip (R. 243). The defense in its case attempted to demonstrate, through the business records of an accredited hospital, that Boriello did no traveling in April. The Court, however, struck these records just prior to the defense summations.

ing, he informed the petitioner that he had "run across some goods" in Thailand which were readily available in large quantities and would cost $7,500 per kilogram. Boriello asked Battista and petitioner to chemically test a sample of his wares. Several days later Battista reported that the samples were almost pure. Boriello then suggested to the petitioner that for $15,000 or $20,000, he could import a kilogram of heroin (R. 119).* Boriello's plan, which was later implemented, called for financing by the petitioner and the use of a woman acting as a courier (R. 120). On June 1, following the recruitment of his courier, Boriello and a woman identified only as "Aurora", flew separately to Bangkok via Amsterdam (R. 122-126).

Following the couple's arrival in Thailand, Boriello obtained and packaged one kilogram of heroin, strapped it to his courier's body, and then returned to Los Angeles via Tokyo and Hawaii (R. 126-127).

After landing in Los Angeles, he took possession of the drugs and flew directly to New York, where he delivered them to petitioner. (R. 128-134; GX 2, 3, 4).

Approximately one week later Boriello claimed he received $9,000 from petitioner and the two discussed further trips to the Far East (R. 135-136). According to Boriello he agreed to recruit couriers and petitioner agreed to furnish special false bottomed suitcases, which would be used to transport the contraband.

On or about July 5, Boriello and his paramour, flew to San Francisco to attempt to recruit couriers for his planned trip to Bangkok. Immediately on his arrival in

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* References in parenthesis using the prefix "R" refer to the trial transcript. The prefix "A" refers to petitioner's joint appendix in the United States Court of Appeals. "GX" refers to Government Exhibits and "DX" to Defense Exhibits.

California, Boriello telephoned Joseph Florio, an old friend he had known from their participation in "Synanon" (R. 140-592). Although Florio refused Boriello's offer to act as a courier, he gave Boriello the name of one Gene Travers, who agreed to participate in the venture (R. 144, 595, 682).

After leaving the San Francisco area, Boriello and his paramour Leslie Laub traveled to Orange County, California to visit Richard and Linda Klinger, friends of Mrs. Laub, and in further quest of couriers (R. 145). During the course of their stay with the Klingers, Boriello importuned Klinger to either participate in Boriello's scheme as a courier or provide the name of one who would (R. 145-148). Klinger suggested Jan Portman, an old friend of his from Florida, and after several phone conversations, she agreed (R. 146, 447-450).

His recruiting trip a success, Boriello returned to New York (R. 150). Shortly after his arrival, Boriello met with the petitioner, informed him that two couriers were ready. According to Boriello, the petitioner stated the suitcases would be ready as soon as Boriello was ready (R. 150-151). Boriello spent the next several days meeting with and instructing Travers in New York and Portman in Florida as to their duties and responsibilities (R. 151-154, 451-454, 682-684).

During the course of these preparations, Larca asked Boriello to arrange to meet Travers at a luncheonette in the Bronx so that he could observe and presumably approve Boriello's choice. Boriello agreed, and the observation took place the following day (R. 155-159, 687-691; GX 26). Following this staged observation, Travers and Boriello went to Boriello's home in Riverdale where Travers received $5,000 or $6,000, two false bottom suitcases, and instructions for contacting Boriello in Thailand (R. 162-165, 691-693; GX 11-14). Finally Boriello gave

Travers one-half of a twenty dollar bill stating that if anything happened to him "his people would have the other half of the twenty." (R. 694; GX 31). The two then arranged to meet in Bangkok the week of August 10, 1976 (R. 692). The following day, Travers began his sojourn to the Orient via Amsterdam, Brussels, Munich and Paris (R. 696).

Shortly after Travers departure, Boriello met Portman at the Sheraton Hotel, where he gave her two false-bottom suitcases, $6,000 and told her to be in Bangkok on August 11, 1976 (R. 168-169, 460-462; GX 13, 14). Following her instructions, Portman left New York on July 28 and flew to Thailand via Tokyo, Hong Kong and Indonesia. She arrived in Bangkok on August 12, 1976. (R. 463).

Immediately following Portman's departure from New York, Boriello, his paramour, and her daughter left New York for London (R. 173). From London they traveled to Thailand via Paris, Marseilles, St. Tropez, Nice and India (R. 174) Boriello and his small entourage arrived in Bangkok on August 11, 1976.

Following his arrival in Bangkok, Boriello contacted Lee Chai, his source; made arrangements for the purchase of 10 kilos of heroin for $65,000 and contacted his fellow traveler Gene Travers, to whom he delivered the contraband for packaging (R. 176-177, 697).

Boriello's plans, however, began to go awry almost immediately. To the chagrin of Boriello and Travers, the contraband would not fit into the allotted space in Travers' two suitcases. Boriello thus instructed Travers to pack what he could and save the balance for Jan Portman, Boriello's second courier (R. 178). Portman arrived in Bangkok later than expected, and Boriello was not able to properly integrate her into his plans (R. 180,

699). Consequently, on August 16, the day that his visa expired, Boriello left Bangkok with Travers in charge of completing the packing and coordinating his and Portman's return trip (R. 466-472). Boriello did, however, give his two couriers instructions on how to proceed once they had reentered the United States. He told Travers to return to New York and wait at his apartment. Portman was instructed to check into the New York Sheraton and wait to be contacted (R. 184).

On the day following Boriello's departure, Travers and Portman finished packing the contraband into their false-bottom suitcases and made preparations for their departure. On August 17, 1976 Portman and Travers left Bangkok for the United States. Travers was to fly directly to Hawaii while Portman would return via Tokyo (R. 476, 701).

On August 17, 1976, Travers arrived in Honolulu. As he went through customs, his suitcases were seized and his contraband discovered. He was then arrested and agreed to cooperate with the agents of the DEA by making a controlled delivery in New York (R. 702, 732-733). Agents of the DEA then removed all but a small part of the contraband and re-packed Travers' four suitcases with flour and sugar (735). The following day, Travers accompanied by several agents flew from Hawaii to New York where they were met by Agents Paige and Kobell of the New York office (R. 735-739). After an interview at DEA headquarters, Travers and the agents went to Travers' apartment to wait for Boriello.

Similarly, when Portman arrived in Honolulu on August 18 she too was arrested, agreed to cooperate and make a controlled delivery (R. 477-478, 565-570, 576-578).

The DEA's trap was now baited and set. Portman was safely ensconced at the Sheraton Hotel, Travers

waited at his apartment and the surveillance teams were ready. It remained only for the bait to be taken and the trap to be snapped shut. The Government did not have to wait long. Immediately on his return to New York on August 20, Boriello called Travers at home and told him he would be in touch later that day (R. 186-187, 703; GX 50-50a). Boriello followed by Special Agent White then traveled to the home of the petitioner (R. 211, 799-781; GX 17).

According to Boriello, petitioner asked how the trip had gone. Boriello replied "O.k." and then handed him what appeared to be a business envelope (R. 782). Boriello then left petitioner's home, failed in an attempt to reach Portman, and returned to petitioner's residence (R. 218).

Shortly thereafter, petitioner and Boriello drove to Bronx Park East where a red Ford Granada was parked (219). According to Boriello, petitioner instructed him to get in the red Ford, check its registration, and to be sure to be at 58th Street and Fifth Avenue by 5 p.m., where he would be waiting (R. 219-220). Boriello then drove the red Ford to the vicinity of Travers' apartment. En route, he called Travers and told him to have the suitcases ready and waiting when he drove up and honked the car horn (R. 221). When Boriello arrived at Travers' residence there was no response to their prearranged signal, so he went into the apartment and assisted in getting the suitcases downstairs and into the car (222). As Travers and Boriello were loading the contraband into the red Ford, Boriello was arrested in possession of the drugs and a large sum of money (R. 223-224, 882, GX 8, 8a-8c). Within minutes, he agreed to cooperate; was debriefed and ordered to proceed with his plan as if nothing had occurred (R. 882-883). As requested, Boriello, followed by several agents of the DEA, drove the red Ford to 58th Street and Fifth Avenue (R. 224, 882). Once there, he parked a few cars from the

corner of Fifth Avenue on the southside of the street (R. 886). Within minutes the petitioner and his co-defendant Madonna emerged from a local restaurant (R. 228, 886). Petitioner and Boriello then exchanged car keys, and Boriello was instructed to return to his home (228). Madonna then entered the drivers' side of the Ford, while petitioner entered the passenger side. At the same time, Boriello attempted to enter a Cadillac convertible which was parked directly in front of the Ford (R. 886). All three defendants were then arrested; the Ford seized and later searched; and the bogus contraband recovered (R. 886, 889, 939-940, 961-962).

C. The Facts Relating to the Hospital Records

It will be recalled that Joseph Boriello, the linch-pin of the prosecution's case against the defendant Larca, testified that he first discovered his source for the heroin during a trip he took to Thailand in April 1976 (R. 104, 105, 109). It was this heroin, which became the fountainhead for the contraband involved in the criminal venture charged herein.*

In an effort to discredit this critically important testimony concerning the April trip, the defense subpoenaed the records maintained by the Methadone Clinic of the Albert Einstein Hospital (R. 1456).** Although the directors of the program were extremely hesitant to produce the records of Mr. Boriello, the Court intervened and the records were finally produced at the end of the defendants' cases.

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* Significantly, the Government failed to produce any corroborating documents for this trip. Indeed Boriello maintained he had used a forged passport obtained from one "Smith" for the trip. Naturally, the travel document was destroyed prior to trial (R. 242-244, 255-256).

** Boriello was a patient at the clinic in 1976.

They revealed that Boriello was present at the Methadone Clinic on April 15, 16, 19, 20, 21 and 26 of 1976 and that on May 12, 1976 he received a letter from the Clinic stating that inasmuch as he was making good progress, he was free to travel to Europe (A. 143-145). This evidence illustrated beyond any doubt that Boriello had lied about travelling to the Far East in April 1976. After a lengthy review of the documents, the Court agreed that they should be admitted in evidence (A. 145) and formally admitted them as Exhibit "V" (A. 152-153, 313). Following the admission of DX "V", the prosecutor gave his closing argument. Immediately following that argument, the Court reported to all counsel that two individuals from the Einstein program had arrived at his chambers and wanted to speak with the Court with respect to Exhibit V (R. 1842). There followed an off the record *ex parte* conference between these individuals and the Court. These individuals who were administrators of the methadone program, then informed Court and counsel that DX "V" was not reliable, inasmuch as the entries were made essentially for billing rather than for the purpose of recording the accurate date of a patient's visit (A. 157-163). Thereafter, over the defense's objection and request to call the "amanuensis" of the records as a defense witness, the Court struck the Exhibit (A. 164-166). Following the jury's verdict, the Court received a letter from the Assistant to the Director and Counsel of the Methadone Maintenance Treatment Program which indicated that DX "V" was in fact reliable (A. 299-302). More specifically, the letter (CX 1) indicated:

> ". . . We, therefore, have searched for secondary sources which we now produce even though neither of the above documents speak didectly to the issue of attendance during the time in question. However, in each case, the recorder is able to infer that the witness was probably present.

With regard to the Doctor's Order sheet, the pharmacist who recorded the change in methadone dosage on May 2, 1976, pursuant to doctor's order of April 27, 1976, can state that, as a matter of Program pharmacy procedures, such an order and change does not occur without direct communication on the part of the patient and, therefore, Mr. Boriello must have been present.

With regard to the Record of Patient Contact, the counselor is prepared to state that, as a matter of regular Program Counseling procedure, entries are made indicating patient vacation or travel medication requests as well as instances of missed medication. Mr. Boriello's record is silent as to these matters and, therefore, his counselor concludes that he must have been present." (sic) (Emphasis supplied).

Reasons for Granting The Writ

This Petition raises a pressing and substantial question of interpretation of the newly promulgated Federal Rules of Evidence and their interplay and interrelationship with the Sixth Amendment's right of confrontation. Additionally this case presents the court with an opportunity to establish what foundation is necessary for the admissibility of hospital records under the Federal Rules of Evidence.

ARGUMENT

The Petitioner's Rights To Have Compulsory Process And To Confront The Witness Against Him Were Violated By The District Court's Exclusion Of Hospital Records Which Demonstrate That The Prosecution's Key Witness Gave Perjured Testimony As To Material Facts.

During its case, the defense sought to admit business records of the Einstein Hospital Methadone Maintenance program pursuant to Rule 803(6) of the Federal Rules of Evidence. That Rule states:

> "A memorandum, report, record, or data compliance, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or date compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit."

After reviewing the records (DX V) the court concluded that the records were, in fact, admissible and thus, admitted them into evidence (1747-48). Nevertheless, following an ex-parte conference with the two individuals from the hospital the court which was apparently concerned more with expedience than with the defendant's right to a fair trial, sua sponte struck the

exhibits without so much as one word of sworn testimony as to the lack of trustworthiness of the defendant's exhibit. The court ruled:

> "I'm not going to delay the trial. This is a matter that is not directly involved in this trial. You have other issues, it seems to me, that go to the credibility of this man. I'm not holding up the trial for that.
>
> "As far as my ruling on the matter is concerned, it is that the records are not reliable. It is on here. If I made an error, then, of course, if necessary, you know what to do with it." (A. 165-166).

While it is true that trustworthiness is a threshold question for the Court, *United States* v. *Robinson*, 544 F.2d 1101-1115 (2d Cir., 1976), that issue must be a reasoned one based on more than unsworn ex-parte communications *United States* v. *De Georgia*, 420 F.2d 889, 893 (9th Cir., 1969). As noted in *De Georgia* there must be an opportunity to allow the proponent to demonstrate reliability under oath. Here the District Court, despite counsel's request, denied the appellant that opportunity. This, in effect, deprived the petitioner of his constitutional right to have compulsory process and to call witnesses in his behalf.

We respectfully submit that the Court's refusal to permit counsel to call the necessary witnesses he believed necessary to demonstrate the necessary quantum of trustworthiness was not only an evidentiary error of grace magnitude, but rose to the level of depriving the defendant of his constitutional rights to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense, and most important, the right to confront the witnesses against him—here the two witnesses from the clinic.

Inasmuch as it appeared from the face of the documents offered in evidence that they were kept in the regular course of business and that it was in the regular course of business to keep those records, the defendants prima facie demonstrated their "trustworthiness." See Advisory Committee notes to Rule 803(6), *McCormick on Evidence* 281, 286-287, and Laughlin "Business Entries and the Like", 46 Iowa Law Review 276 (1961). Moreover, there was no indication that the records sought to be introduced were "dripping with motivation to misrepresent," *Palmer* v. *Hoffman*, 129 F.2d 976 (2d Cir.), *aff'd.*, 318 U.S. 109, 63 S. Ct. 477 (1942) nor was there any person interest by the preparer in the outcome of the litigation *Taylor* v. *Baltimore & Ohio R.R. Co.*, 344 F.2d 281, 285 (2d Cir., 1965).

On the other hand the opponent of the admission of the documents offered no sworn evidence as to their lack of trustworthiness. If the court believed that there was some issue as to the reliability of the offered documents, he should have conducted a brief *voir dire*. Failure to do so deprived the defendant of an opportunity to destroy the semenal forces of the prosecution's case against him. The exclusion of this highly relevant and probative evidence clearly affected the judgment and was therefore reversible error.

Respectfully submitted,

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APPENDIX

APPENDIX A

Oral Opinion of the United States Court of Appeals For the Second Circuit

(The following statement does not constitute a formal opinion of the court and is not to be reported. It shall not be cited or otherwise used in unrelated cases.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket # 77-1001

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v—

MATTHEW MADONNA, a/k/a PAUL DEROBERTIS, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO, RICHRD KLINGER,
Defendants,

MATTHEW MADONNA, a/k/a PAUL DEROBERTIS, SALVATORE LARCA,
Defendants-Appellants.

Before: HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judge,

JACOB MISHLER,* and MILTON POLLACK,**
District Judges.

New York, New York
April 4, 1977

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* Chief Judge, Eastern District of New York.
** Southern District of New York, sitting by designation.

APPENDIX A—Oral Opinion of the United States Court of Appeals, For the Second Circuit

Statement made by the Court at disposition of appeal in open court.

JUDGE VAN GRAAFEILAND:

Counsel, as you know we read the briefs in advance, and we've listened very carefully to the arguments, which were excellent. We're prepared to make our ruling from the bench, and we're going to affirm the conviction. There were several questions raised that I'll comment on just briefly.

Testimony as to the prior conviction meets the requirement of imprisonment in excess of one year and release from prison within ten years under Rule 609. The question was therefore for the Court in the exercise of its discretion as to whether the probative value of the testimony outweighed its prejudicial effect on the defendant. In view of the serious nature of the crime involved and the manner in which it occurred, we see no abuse of the trial court's discretion. There is no requirement in the rules that the trial court must hold an evidentiary hearing whenever the issue of the admissibility of a prior conviction is raised. Since we find no abuse of discretion herein, we need not pass upon the Government's contention that the argument raised by appellant is academic, lacking any indication on defendant's part that he intended to take the stand, or what the nature of his testimony would be. We do note, however, that defendant did not press for a decision on his motion to preclude and that the question raised might therefore well have been academic.

With regard to the statements of Madonna to Larca concerning his automobile, the testimony of Larca and

APPENDIX A—Oral Opinion of the United States Court of Appeals, For the Second Circuit

Battista as to Madonna's alleged statement to Larca concerning his car was properly excluded in the discretion of the trial court. If the inference which the defendant wished the jury to draw from this testimony was that Madonna was simply going to the rendezvous to recover his car, or that he had not rented the car for the purpose of lending it to Boriello, then the statement was hearsay. If the statement was not offered for this purpose, it had no probative value. We do not feel that this alleged statement comes within the provisions of Rule 803(3) because it did not deal with the defendant's then existing mental, emotional or physical condition. It was, in fact, a statement of memory of a past event.

With regard to the admission of Visceglia's testimony, it is the settled rule of this court that evidence of prior offenses is admissible, unless offered only for the purpose of showing defendant's criminal character, or unless its potential for prejudicing the defendant outweighs its probative value. The testimony as to Madonna's and Larca's previous joint participation in the proposed sale of narcotics was admissible for the purpose of showing the intention of the parties in the instant case, within the exercise of the District Court's broad discretion.

With regard to the Einstein Hospital records, because there was substantial evidence before the District Court that the copies of the hospital records indicated a lack of trustworthiness within the meaning of Rule 803(8) of the Federal Rules of Evidence, the Court was justified in the exercise of its discretion in excluding them. We conclude from reading the record that the Court's reference to D.E.A. agent Meale at page 1844 was, in actuality, intended as a reference to Mr. Marion who was requested in the same statement to put his remarks on

the record. In affirming with regard to this point, we do not intend to indicate our approval of the procedure followed by the District Judge in conferring with the witnesses in chamber in the absence of counsel; but it appears from the record that no objection was made by counsel to this procedure.

With regard to the Portman-Klinger tapes, concerning which no argument was made in court this morning, probably for lack of time, in view of Klinger's statements that he did not know the parties involved and intended the "Godfather" references only as a joke, and the District Court's careful limiting instructions, we do not find that the admission of this taped conversation constituted prejudicial and reversible error.

We find all other allegations of error to be without substance and we therefore affirm.

APPENDIX B

Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of May, one thousand nine hundred and seventy-seven.

Present: HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judge

HON. JACOB MISHLER,
HON. MILTON POLLACK,
District Judges

77-1001

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MATTHEW MADONNA, a/k/a PAUL DEROBERTIS, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO, RICHARD KLINGER,
Defendants,

MATTHEW MADONNA, a/k/a PAUL DEROBERTIS, SALVATORE LARCA,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant, Salvatore Larca

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

APPENDIX B—Order of United States Court of Appeals

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of May, one thousand nine hundred and seventy-seven.

77-1001

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MATTHEW MADONNA, a/k/a PAUL DEROBERTIS, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO, RICHARD KLINGER,
Defendants,

MATTHEW MADONNA, a/k/a PAUL DEROBERTIS, SALVATORE LARCA,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant Salvatore Larca, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
IRVING R. KAUFMAN,
Chief Judge

APPENDIX C

Constitutional and Statutory Provisions

6th Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 803(6) of the Federal Rules of Evidence

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> (6) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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SALVATORE LARCA,
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—v.—

UNITED STATES OF AMERICA,
Respondent.

PETITIONER LARCA'S REPLY BRIEF

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SALVATORE LARCA,

Petitioner,

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UNITED STATES OF AMERICA,

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PETITIONER LARCA'S REPLY BRIEF

In our Petition, we urged that the conduct of the trial court in striking a critically important defense exhibit (e.g., the methodone maintenance records which demonstrated that the Government's witness-in-chief had perjured himself) and thereafter precluding the defense from calling the necessary witnesses to demonstrate the reliability of those records, deprived the petitioner of his constitutional rights to have compulsory process for obtaining witness; to have the assistance of counsel for his defense and deprived him of the right to confront the witnesses against him.

In its brief in opposition the Government urges that the Court was within its discretion in excluding the exhibits after finding them unreliable. In any event, argues the Government, the trial court's error, if any, was harmless. The government's conclusions are totally untenable inasmuch as they are based upon an unsupported

and erroneous view of the facts. The Government's brief is at best misleading from its opening characterization of the disputed hospital records as expurgated xerophic copies to its mistaken belief that the records would only impeach Boriello as to his April trip to Thailand.

Although the methodone clinic's records (DX V) were "redacted", they were so submitted without objection by the Government and to protect the names of the other patients at the clinic. Contrary to the Government's present position their was no "apparent understanding" that the records would later be authenticated.

The Government urges that at trial petitioner made no objection to the *ex parte* procedure adopted by the judge. The Government is clearly mistaken. The procedure used by the trial court was presented to trial counsel as a *fait acompli.* They were not given an opportunity to object.

The Government further premises its conclusion that the Court correctly struck the hospital records, on the assumption that defense counsel had an opportunity to examine certain officials of the methodone clinic. This is a rather disingenious view of the facts. While it is true that an informal conference did occur, the following colloquy took place when the defense sought to establish the reliability of the proffered documents:

> THE COURT: I put it on the record so that you could do what you want to. The records to me aren't reliable and they aren't going to be used.
>
> COUNSEL FOR LARCA: May I ask the person who kept the record be brought in and state—that is, that the, if you will, amanuensis be brought in to establish the reliability of the records.
>
> THE COURT: I'm not going to delay the trial . . ." (A. 165-166).

In short, no direct or cross-examination under oath occurred which would have established or negatived the trustworthiness of the proffered documents. This is not the stuff upon which our system of advocacy is based.

Consequently, the Government's conclusion that the trial court acted within its discretion in excluding the documents as not trustworthy is incorrect because it is based on the notion that "the *testimony* of the clinic official established that these records were not reliable . . ." *There was no such testimony.* The Court, therefore, had no sworn or affirmed facts upon which to make a reasoned decision. On the contrary, the Court's threshold decision, (which we now know was factually incorrect) was based upon unsworn hearsay allegations. cf. *United States* v. *Robinson*, 544 F.2d 1101-1115 (2nd Cir., 1976) and *United States* v. *DeGeorgia*, 420 F.2d 889, 893 (9th Cir., 1969).* The underlying theme of the government's brief (see e.g., p. 6) is that somehow the management of the proper introduction of this critically important document was for the defense. We submit that in view of the court's initial decision to admit the documents followed by its summary decision to strike them, it was the Court's responsibility to properly manage the admission or non-admission of the questioned documents by granting the defense an opportunity to lay a proper foundation.

Finally, the Government falls back upon the sometimes abused doctrine of harmless error. They urge that since the hospital records attacked their informant's credibility as to his April trip, his testimony with respect

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* The Government's assertion that the clinic's post-verdict letter is secondary material is simply untrue. On the contrary, a reading of those documents reveals that they are primary source documents which demonstrate beyond peradventure, Borello's presence at the clinic in April 1976.

to his subsequent sojourns remained intact. This position cannot be supported. *Clear and patent perjury committed by the prosecution's witness-in-chief should never be condoned as harmless.* Moreover, if the jury disbelieved Boriello's narrative as to his April trip, it may well have disbelieved his entire narrative inasmuch as the April trip and his subsequent return to the Far East were inexorably bound as are a row of dominoes.

We respectfully submit that the Court's refusal to permit counsel to call the witnesses he believed necessary to demonstrate the correct quantum of trustworthiness was not only an evidentiary error of great magnitude, but rose to the level of depriving the defendant of his constitutional rights to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense, and most important, the right to confront the witnesses against him—here the two witnesses from the clinic.

Respectfully submitted,

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